

**IN THE
MISSOURI SUPREME COURT**

MARK D. VOGL,)	
)	
Appellant,)	
)	
vs.)	No. 93157
)	
STATE OF MISSOURI,)	
)	
Respondent.)	

**APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF JASPER COUNTY, MISSOURI
29TH JUDICIAL CIRCUIT, DIVISION 2
THE HONORABLE DAVID C. DALLY, JUDGE**

APPELLANT'S SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

Appellant, Mark Vogl, appeals from the Circuit Court's denial of his motion to reopen his Rule 24.035 motion. Mr. Vogl pleaded guilty, in *State v. Mark Vogl*, 06AO-CR01495-01, in the Circuit Court of Jasper County, to two counts of statutory sodomy in the first degree, Section 566.062, RSMo 2000. He was sentenced to two concurrent terms of fifteen years imprisonment.

Mr. Vogl was delivered to the Missouri Department of Corrections on September 18, 2007. Mr. Vogl mailed his *pro se* post-conviction motion to the Jasper County Circuit Clerk's Office in Carthage, Missouri, on March 12, 2008, with the motion leaving the prison the morning of March 13, 2008. Mr. Vogl asserts that the Jasper County Circuit Clerk's Office in Carthage received his motion on March 17, 2008, the due date for the motion. Mr. Vogl asserts that the Carthage office did not file stamp his motion but forwarded it to the clerk's office in Joplin, where it was received and file stamped the next day, March 18, 2008, one day past the deadline.

On April 3, 2008, the Circuit Court appointed counsel to represent Mr. Vogl in the Rule 24.035 proceeding. On April 16, 2008, appointed counsel filed a "Motion Requesting Appointment of Counsel be Rescinded," which declared that Mr. Vogl's *pro se* motion was untimely filed. On April 22, 2008, the Circuit Court entered an Order rescinding its previous Order appointing counsel and dismissing the case with prejudice.

On May 11, 2012, Mr. Vogl filed a *pro se* "Motion to Reopen Postconviction Proceeding and Request for Hearing." On May 21, 2012, the Circuit Court overruled Mr.

Vogl's motion to re-open the proceedings, without an evidentiary hearing. Mr. Vogl timely filed a Notice of Appeal.

On January 16, 2013, the Court of Appeals, Southern District, reversed the motion court's denial of Mr. Vogl's motion to re-open the post-conviction case, without an evidentiary hearing, and remanded the case to the motion court for a holding of an evidentiary hearing to determine if the motion was timely filed.

The State filed a Motion for Rehearing or Application for Transfer, which was denied by the Court of Appeals on February 7, 2013. This Court granted the State's Application for Transfer on February 22, 2013. Therefore, this Court has jurisdiction to hear this case. Missouri Supreme Court Rule 83.04.

STATEMENT OF FACTS

On June 21, 2007, Appellant, Mr. Mark Vogl, pleaded guilty to two counts of first degree sodomy, in Jasper County Circuit Court Case Number 06AO-CR01495-01 (L.F. 3, 6, 15-16).¹ On August 30, 2007, the Circuit Court of Jasper County sentenced Mr. Vogl to two concurrent terms of fifteen years imprisonment (L.F. 3, 6, 15-16). Mr. Vogl was delivered to the Missouri Department of Corrections on September 18, 2007 (L.F. 18, 24). Pursuant to Rule 24.035(b), any *pro se* Form 40 filed by Mr. Vogl would have been due within 180 days of his delivery to the Missouri Department of Corrections, which would have been by March 16, 2008. Because March 16, 2008, was a Sunday, the last date for the motion to have been timely filed would have been March 17, 2008.²

The Joplin office of the Jasper County Circuit Clerk received and file stamped a *pro se* Form 40 filed by Mr. Vogl on March 18, 2008 (L.F. 9, 17, 18-23). A cover letter dated March 12, 2008, was filed with the *pro se* Form 40 (L.F. 9, 17). In the cover letter, Mr. Vogl wrote that the prison mail goes out every morning at 8 a.m., and he needed to get the Form 40 in the mail on the day he received it, March 12, 2008, in order to make the deadline; therefore, he did not include copies of the Form 40 (L.F. 17).

¹ The Record on Appeal consists of a Legal File (referenced “L.F.”). Undersigned counsel also intends to file a Supplemental Legal File (referenced “Supp. L.F.”).

² Missouri Supreme Court Rule 44.01(a) provides that if a period of time ends on a Saturday, Sunday, or legal holiday the deadline is extended to the end of the next day that is not a Saturday, Sunday, or legal holiday.

On April 3, 2008, the Circuit Court of Jasper County appointed counsel to represent Mr. Vogl in his Rule 24.035 case (L.F. 9). On April 16, 2008, Mr. Vogl's appointed counsel, Mr. Stephen Harris, District Defender, Office of the Post-conviction Division, Missouri State Public Defender, Columbia, Missouri, filed a "Motion Requesting Appointment of Counsel be Rescinded" (L.F. 9, 24-26). In the motion, appointed counsel requested the Court to rescind its order appointing counsel in Mr. Vogl's case and set forth as follows: "At the time of filing of his Form 40, Movant has spent 182 days in the Department of Corrections...;" "The Court is without jurisdiction to appoint counsel ... [and] has no authority to proceed;" "Rule 4-3.3(a)(3) mandates that a lawyer shall not knowingly fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel;" and "Rule 24.035 and case law defining the limitations for filing under the rule are clear and it is not within counsel's means to obviate those requirements" (L.F. 24-25).

On April 22, 2008, the Circuit Court granted appointed counsel's Motion Requesting Appointment of Counsel be Rescinded and found that "Movant has failed to comply with Rule 24.035 and file his Criminal Procedure Form 40 within 180 days" (L.F. 9, 27). Having found that Mr. Vogl's *pro se* Form 40 was untimely, the Circuit Court also dismissed the case with prejudice (L.F. 9).

On November 9, 2009, Mr. Vogl wrote to the Jasper County Circuit Clerk's Office, requesting copies of documents from his post-conviction case (L.F. 9, 28). The office responded and sent Mr. Vogl a copy of all documents contained in the post-

conviction file but wrote: “Unfortunately, we do not have the envelope you mailed your documents to us in as part of the file” (L.F. 9, 28).

On January 10, 2010, Mr. Vogl wrote to the Jasper County Circuit Clerk’s Office, requesting information on how mail received in the Carthage office of the Jasper County Circuit Clerk’s Office was forwarded to its Joplin office (L.F. 9, 29). On February 3, 2010, the clerk responded and wrote as follows:

Mail is received in whichever office the envelope is addressed to;

When mail is opened and determined to belong to a different office in the Courthouse, the mail is taken to the correct office (in this case the correct office was the Jasper County Circuit Clerk’s Office);

Jasper County Circuit Clerk’s Office in Carthage determined your original case was handled in the Joplin location and any subsequent filings must also be filed in the Joplin location and placed your documents in a basket for our “runner” to pick up to deliver to Joplin. Our “runner” picks up every afternoon in Carthage and delivers to the Circuit Clerk’s Office in Joplin the following morning. He also delivers mail received in Joplin that needs to go to Carthage.

(L.F. 9, 29).³

³Jasper County Local Court Rule 4.3 provides that “[a]ll Circuit Court actions shall be filed with the Circuit Clerk of this County in Joplin or Carthage.” “A post-conviction motion is considered filed when deposited with the circuit court clerk.” *Graves v. State*,

On May 26, 2010, Mr. Vogl wrote to Mr. Harris, who had been previously appointed to represent him in the post-conviction case, to inform him of what he had learned regarding the procedures employed by the Circuit Clerk's Office in processing his Form 40 (L.F. 33). On June 1, 2010, Mr. Harris responded, "Yes, I would like for you to send me a copy of the letter [from] Ms. Williams indicating the day your Form 40 was received. If that appars [sic] to make a difference, I will request the Court reopen your case" (L.F. 33).

On June 11, 2010, Mr. Vogl again wrote to Mr. Harris, and Mr. Harris responded in a letter dated June 22, 2010, as follows:

I received your letter dated June 11, 2010 on June 18 along with your and enclosures [sic], you make a case for your original form 40 being timely filed. It would require some conjecture to state that it was actually timely filed, however, the inference is certainly there. I see two possible ways to go at this time, you could either file a motion to open the case back up, or file another Form 40 and if the issue of timeliness comes up address that situation with the facts, as you known them, from your first attempt to file.

372 S.W.3d 546, 548-549 (Mo.App., W.D. 2012), *quoting Trice v. State*, 344 S.W.3d 277, 278 (Mo.App., E.D. 2011).

If you decide to file a motion to reopen your case, set out the facts and attache [sic] the evidence you have, and cite to applicable case law. (L.F. 34).⁴

On June 27, 2010, Mr. Vogl wrote to the Jasper County Circuit Clerk's Office in Carthage, stating that he "need[ed] to know when your office received [his Form 40], not when the Joplin office received it, after your office forwarded the mailing. If nothing was stamped received by your office[,] I need written reason why mailing or envelope was not stamped by your Carthage office" (L.F. 10, 30-31). Mr. Vogl cited relevant case law and wrote: "Supreme Court of Missouri has held that where a motion for post-conviction relief is filed within the time period but sent to the wrong court, it should be considered timely filed and should be transferred to the proper court rather than be dismissed" (L.F. 30-31).

The aforementioned letter was initially file stamped on July 1, 2010 as filed with the "Jasper County Circuit Clerk, Carthage, Missouri," but that file stamp was crossed

⁴ Missouri Supreme Court Rule 4-3.3 provides that a lawyer shall not knowingly "fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer..." As such, Mr. Harris should have made some attempt to assist Mr. Vogl, have a conflict counsel assigned to assist Mr. Vogl, or to have corrected his previous declaration to the motion court, which represented to the motion court that the *pro se* Form 40 was out of time (L.F. 24-26).

out (L.F. 30). A file stamp of July 2, 2010 indicated that the letter was file stamped the next day by the “Jasper County Circuit Clerk, Joplin, Missouri” (L.F. 30).

On August 6, 2010, the clerk responded to Mr. Vogl’s letter and wrote as follows:

In response to your letter dated June 27, 2010, and bears a postmark of June 28, 2010 and was received in our Carthage office on July 1, 2010 and in our Joplin office on July 2, 2010, you were previously notified that the envelope you mailed your Motion to Vacate, Set Aside or Correct the Judgment or Sentence is not in the file.

According to your letter dated March 12, 2008, your Motion was being mailed without copies since your housing unit was locked down and it needed to be mailed immediately. It is my presumption that your Motion went out in the next morning’s mail, being Thursday, March 13, 2008. If, as you state, mail takes three (3) days from Cameron to Carthage, that would put it being received on Sunday, March 16, 2008 on which there is no mail delivery, subsequently being delivered to our Carthage office on Monday, March 17, 2008 and received in our Joplin office on Tuesday, March 18, 2008.

On Mondays, when we receive an abundant amount of mail, it is our normal procedure for mail to be delivered to another office to stamp one (1) envelope with the date received and then rubber band anything else to that piece of mail. ...

(L.F. 10, 32).

On August 20, 2010, Mr. Harris responded to Mr. Vogl's letters seeking help with how to reinstate his *pro se* Form 40, and Mr. Harris provided the following advice:

I have finally found the time to go over your letters and try to determine if you have an argument for asking the Court to reinstate your Rule 24.035 postconviction case. Based on the correspondence you received from Ms. Williams it appears there is potential evidence to support your argument. Whether or not the Court has jurisdiction at this late of date is questionable. I think [it] is worth filing such a motion. ... You seem to have a good handle on the facts and the ability to draft such a motion. Attach copies of any evidence you have supporting the fact your Form 40 arrived in Carthage on Monday March 17, 2008 and cite the relevant case law you included in your letters.

(L.F. 35).

On March 9, 2011, Mr. Vogl wrote to Mr. Harris and enclosed a motion that he had drafted for Mr. Harris' review (L.F. 35). On March 10, 2011, Mr. Harris informed Mr. Vogl that the motion appeared to be a "well thought out and thorough motion" and suggested that Mr. Vogl file the motion (L.F. 35).

On March 17, 2011, Mr. Vogl filed a *pro se* "Motion to Reinstate Post-Conviction Action Brought Pursant [sic] Rule 24.035 on basis of Timely Filing, and to Vacate Order Rescinded Appointment of Counsel and Dismissing 24.035 Action" (L.F. 10, 37-44). The envelope, in which Mr. Vogl mailed the motion and attachments, was retained by the Circuit Clerk's Office in Joplin (L.F. 44). The envelope indicates that: the motion and

enclosures were “mailed from Crossroads Correctional Center;” the envelope was postmarked March 15, 2011; the envelope was addressed to the Joplin office of the Circuit Clerk’s Office; and the envelope was file stamped as received at the Joplin office on March 17, 2011 (L.F. 44).

Thereafter, Mr. Vogl wrote to the clerk’s office periodically to check on the status of his motion (L.F. 10, 45).

On November 4, 2011, the Circuit Court entered the following order: “...This Court has previously dismissed this action with prejudice for failure to file Motion within the time allowed by the rules. This Court will take no further action on this file” (L.F. 10, 46).⁵

On May 11, 2012, Mr. Vogl filed a *pro se* “Motion to Reopen Postconviction Proceeding and Request for Hearing” and attachments (L.F. 11, 47-56). Mr. Vogl’s motion included the following allegations:

On April 3, 2008, the Circuit Court of Jasper County appointed a public defender to represent movant on his rule 24.035 *pro se* motion. This appointment was made to assist the movant in preparing any amended motion that may be necessary and to represent movant in any litigation that

⁵ Mr. Vogl attempted to perfect an appeal from that order (L.F. 10-11); he sought the appointment of counsel in the Court of Appeals, but such motion was denied and the appeal was ultimately dismissed in May 2012, due to Mr. Vogl’s “Failure to Perfect Appeal.” *Vogl v. State*, SD31797.

may result from movant's 24.035 motion. On April 16, 2008, the public defenders office filed a motion to rescind order of appointment based on counsels assertion that movant's 24.035 motion was filed untimely. *The motion was filed without any consultation with counsel's client, the movant. If counsel had contacted movant, counsel would have obtained the facts that would have made counsel's motion to rescind without merit.....*

Additionally, movant asserts he never received any notification from Public Defenders Office that his counsel intended to file a motion to rescind counsels appointment to represent movant. Had the movant been duly notified, he would have attempted to contact the court to request a hearing in said motion.

No action was performed on the movants behalf while the appointed counsel represented him. Postconviction counsel did not comply with V.A.M.R. 24.035(e) which requires counsel to either file an amended motion for postconviction relief if his pro se motion does not assert sufficient facts, or include claims known to movant, or if counsel determines no amended motion shall be filed, to file statement explaining that all facts supporting claims and all claims known to movant are asserted in the pro se motion. The counsel has presumably abandoned movant. ...

(L.F. 11, 48-50).

On May 21, 2012, the Circuit Court of Jasper County overruled Mr. Vogl's Motion to Reopen Postconviction Proceeding and Request for Hearing (L.F. 11, 57). This appeal follows (L.F. 12, 58).⁶

On January 16, 2013, the Court of Appeals, Southern District reversed the motion court's denial of Mr. Vogl's motion to re-open the post-conviction case and remanded the case for a hearing on the issue of whether Mr. Vogl timely filed his *pro se* Form 40. *Vogl v. State*, SD32097. The Court of Appeals held that this case falls within the well-established category of "abandonment" that occurs in situations when post-conviction counsel takes no action with respect to filing an amended motion or a statement in lieu of amended motion, and the record shows the movant is deprived of a meaningful review of his claims (Opin., p. 5).

After the Court of Appeals, Southern District issued its decision in this case, the Circuit Court of Jasper County, the Honorable David C. Dally, presiding, entered the following Order on January 31, 2013:

...

This is an unusual case in that it appears Movant's original motion was mailed to the Carthage office of the Circuit Clerk. The fact that Jasper

⁶ Mr. Vogl filed the Notice of Appeal early (L.F. 58). In any case in which a notice of appeal has been filed prematurely, such notice shall be considered as filed immediately after the time the judgment becomes final for the purpose of appeal. Missouri Supreme Court Rule 81.05(b).

County is one of the unusual jurisdictions where pleadings can be filed in either Joplin or Carthage complicates the case. The Carthage office determined the pleadings should have been filed in Joplin and the pleadings were transferred from Carthage to Joplin where they were filed one day past the last date for filing the motion under Rule 24.035. Because the motion was not shown as filed until one day late this court rescinded its order appointing counsel and dismissed the case.

This court has determined by an examination of the file that no evidentiary hearing is necessary to determine if Movant was “abandoned” by his appointed counsel. The fact that this court rescinded its order appointing counsel on a case where it appears the motion may have been timely filed establishes the fact that Movant is entitled to have this case reopened.

Case is ordered reopened. Court appoints Public Defender to represent Movant. ...

(Supp. L.F. 1-2).

This Court granted the State’s Application for Transfer on February 22, 2013.

POINT

The motion court clearly erred in denying, without an evidentiary hearing, Appellant's motion to re-open his Rule 24.035 case on the basis that his counsel had abandoned him, where Appellant alleged facts that constituted abandonment and the record shows that Appellant was deprived of a meaningful review of his claims, in violation of Appellant's rights to due process of law, as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 10 of the Missouri Constitution, in that Appellant's appointed counsel failed to file any amended motion and include allegations therein that Appellant's *pro se* motion was received by the Jasper County Circuit Clerk's Carthage office on the due date but was forwarded to its Joplin office, where it was received and stamped a day later (and thus one day late). Rather than conferring with Appellant, investigating the timeliness issue, and filing an amended motion that included allegations of the timely filing of Appellant's *pro se* motion, appointed counsel did the opposite---he quickly moved the Court to rescind the appointment of the public defender's office and wrongly declared Appellant's motion to be untimely, thereby depriving Appellant of a meaningful review of his post-conviction claims, including a review of whether his *pro se* motion was timely filed.

Moore v. State, 934 S.W.2d 289 (Mo. banc 1996);

Gehlert v. State, 276 S.W.3d 889 (Mo.App., W.D. 2009);

Allen v. State, 986 S.W.2d 491 (Mo.App., W.D. 1999);

Dorris v. State, 360 S.W.3d 260 (Mo. banc 2012);

U.S. Const., Amends. V, XIV;

Mo. Const. Art.I, Sec. 10;

Missouri Supreme Court Rule 24.035.

ARGUMENT

The motion court clearly erred in denying, without an evidentiary hearing, Appellant's motion to re-open his Rule 24.035 case on the basis that his counsel had abandoned him, where Appellant alleged facts that constituted abandonment and the record shows that Appellant was deprived of a meaningful review of his claims, in violation of Appellant's rights to due process of law, as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 10 of the Missouri Constitution, in that Appellant's appointed counsel failed to file any amended motion and include allegations therein that Appellant's *pro se* motion was received by the Jasper County Circuit Clerk's Carthage office on the due date but was forwarded to its Joplin office, where it was received and stamped a day later (and thus one day late). Rather than conferring with Appellant, investigating the timeliness issue, and filing an amended motion that included allegations of the timely filing of Appellant's *pro se* motion, appointed counsel did the opposite---he quickly moved the Court to rescind the appointment of the public defender's office and wrongly declared Appellant's motion to be untimely, thereby depriving Appellant of a meaningful review of his post-conviction claims, including a review of whether his *pro se* motion was timely filed.

Mr. Vogl asserts that he timely filed his *pro se* motion for post-conviction relief, pursuant to Rule 24.035, on March 17, 2008, when the Jasper County Circuit Clerk's Office in Carthage received the motion. However, the clerk in Carthage forwarded it to the Joplin office, where it was received and file-stamped March 18, 2008, one day past

the deadline (L.F. 9, 17, 18-23). Thereafter, the Court appointed counsel, Mr. Stephen Harris, District Defender of the Appellate/Post-conviction Division in Columbia, Missouri, to represent Mr. Vogl (L.F. 9). Appointed counsel moved to rescind the appointment and informed the Court that Mr. Vogl filed his Form 40 late (L.F. 24-26). After receipt of counsel's motion, the Court rescinded its order appointing counsel and dismissed the case with prejudice (L.F. 9, 27).

Mr. Vogl was left in a legal no-man's land without a guide, a form motion, or directions on how to navigate his way back into court. With limited resources and no legal knowledge, Mr. Vogl conducted his own investigation and research to show that he timely filed his motion (L.F. 28, 29, 30-31, 32, 33, 34, 35, 37-44). Mr. Vogl was ultimately able to draft and file a "Motion to Reopen Postconviction Proceeding and Request for Hearing," which alleged that his *pro se* motion was timely received by the Carthage office on March 17, 2008, and that his appointed counsel's failure to take any action as required by Rule 24.035(e) created the presumption of abandonment (L.F. 47-56).

After the motion court denied Mr. Vogl's motion to re-open the post-conviction case, the Court of Appeals, Southern District reversed and remanded the case for a hearing. *Vogl v. State*, SD32097. The Court of Appeals was correct—this case falls within the well-established category of "abandonment" that occurs in situations when post-conviction counsel takes no action with respect to filing an amended motion or a statement in lieu of amended motion, and the record shows the movant is deprived of a meaningful review of his claims (Opin., p. 5). The underlying record raises the

presumption of abandonment, and this Court should remand for a hearing, so that Mr. Vogl can adduce evidence that his appointed counsel abandoned him and that his *pro se* motion was timely received by the Jasper County Circuit Clerk's office.

Standard of Review

As with other Rule 24.035 proceedings, the review of the denial of a motion to re-open post-conviction proceedings is limited to a determination of whether the motion court's findings and conclusions of law are clearly erroneous. *Edgington v. State*, 189 S.W.3d 703, 705 (Mo.App., W.D. 2006); *Gehrke v. State*, 280 S.W.3d 54, 56 (Mo. banc 2009). The motion court's findings and conclusions will be deemed clearly erroneous only if we are left with the definite and firm impression that a mistake has been made after reviewing the entire record. *Id.*

Rule 24.035 requires appointed counsel to investigate and then timely file an amended motion or a statement in lieu of amended motion. Such duties include an investigation into whether the Form 40 was timely received but misfiled by the clerk.

Missouri Supreme Court Rule 24.035(e) provides as follows:

When an indigent movant files a pro se motion, the court shall cause counsel to be appointed for the movant. *Counsel shall ascertain whether sufficient facts supporting the claims are asserted in the motion and whether the movant has included all claims known to the movant as a basis for attacking the judgment and sentence. If the motion does not assert sufficient facts or include all claims known to the movant, counsel shall file an amended motion that sufficiently alleges the additional facts and claims.*

If counsel determines that no amended motion shall be filed, counsel shall file a statement setting out facts demonstrating what actions were taken to ensure that (1) all facts supporting the claims are asserted in the *pro se* motion and (2) all claims known to the movant are alleged in the *pro se* motion. The statement shall be presented to the movant prior to filing. The movant may file a reply to the statement not later than ten days after the statement is filed.

Missouri Supreme Court Rule 24.035(e) (*italics added*). “Generally, the word ‘shall’ connotes a mandatory duty.” *Dorris v. State*, 360 S.W.3d 260, 267 (Mo. banc 2012), *quoting State ex rel. City of Blue Springs v. Rice*, 853 S.W.2d 918, 920 (Mo. banc 1993). Rule 24.035(e) requires that post-conviction counsel ascertain whether the *pro se* motion is supported by sufficient facts and includes all claims known to the movant for attacking the judgment and sentence. *Gehlert v. State*, 276 S.W.3d 889, 892 (Mo.App., W.D. 2009); Rule 24.035(e). If the *pro se* motion is deficient in either regard, counsel must file an amended motion that sufficiently alleges the additional facts or claims. *Id.*, *citing Pope v. State*, 87 S.W.3d 425, 427 (Mo.App., W.D. 2002); Rule 24.035(e). On the other hand, if counsel determines that no amended motion shall be filed, counsel must file a statement explaining what actions were taken to ensure the sufficiency and completeness of the *pro se* motion. *Id.*; Rule 24.035(e).

“Sufficient facts” required to be asserted in the amended motion, in order to warrant a hearing and relief, include facts supporting that the movant’s *pro se* Form 40 was timely filed. *Dorris v. State, supra*, contains the following summary of the law that

must be applied to determine whether a movant is entitled to an evidentiary hearing on his post-conviction motion:

In a motion filed pursuant to Rule 29.15 [or Rule 24.035], the movant must allege facts showing a basis for relief to entitle the movant to an evidentiary hearing. *Pollard v. State*, 807 S.W.2d 498, 501 (Mo. banc 1991). The movant also must allege facts establishing that the motion is timely filed. The movant then must prove his allegations. Rule 29.15(i); Rule 24.035(i). (“The movant has the burden of proving the movant’s claims for relief by a preponderance of the evidence.”). In addition to proving his substantive claims, the movant must show he filed his motion within the time limits provided in the Rules. *The movant must allege facts showing he timely filed his motion and meet his burden of proof by either (1) timely filing the original pro se motion so that the stamp on the file reflects that it is within the time limits proscribed in the Rule; (2) alleging and proving by a preponderance of the evidence in his motion that he falls within a recognized exception to the time limits; or (3) alleging and proving by a preponderance of the evidence in his amended motion that the court misfiled the motion.*

Id. at 267 (italics added).

In addition to the above, the Missouri Supreme Court Rules of Professional Conduct require an attorney to be thorough in his representation of his client and require the attorney to act zealously for his client. Missouri Supreme Court Rule 4-1.1 provides:

A lawyer shall provide competent representation to a client.

Competent representation requires the legal knowledge, skill, *thoroughness* and preparation reasonably necessary for the representation.

Missouri Supreme Court Rule 4-1.1 (italics added). The Preamble to the Rules of Professional Conduct, which sets forth “A Lawyer’s Responsibilities,” includes that: “As advocate, a lawyer zealously asserts the client’s position under the rules of the adversary system.”

Case law demonstrates that it is possible for a *pro se* Form 40 to have been timely and yet the file stamp on the face of the motion indicates a date past the deadline. *See Nicholson v. State*, 151 S.W.3d 369, 371 (Mo. banc 2004) (holding post-conviction motion mailed to wrong venue, then forwarded to correct venue after filing deadline, should be considered to have been timely filed based upon the initial date of receipt by the first court); *Graves v. State*, 372 S.W.3d 546 (Mo.App., W.D. 2012) (Post-conviction counsel alleged in the amended motion that the *pro se* motion was timely received in the court’s division but was received and file-stamped after the due date by the circuit clerk’s office, and the Court of Appeals held that movant was entitled to adduce evidence to show the *pro se* motion was timely); *Phelps v. State*, 21 S.W.3d 832 (Mo.App., E.D. 1999) (holding that movant’s motion was timely filed when envelope was stamped with a date indicating it was received by clerk’s office two days prior to deadline, despite stamp on the motion indicating that it was received eight days past the deadline); and *Spells v. State*, 213 S.W.3d 700, 702 (Mo.App., W.D. 2007) (holding that post-conviction motion initially mailed to the wrong court address, where the addressed had recently changed, by

the due date, should have been entertained even though the motion was ultimately file stamped after the deadline).

“The situation of prisoners seeking to appeal without the aid of counsel is unique. Such prisoners cannot take the steps other litigants can take... to ensure that the court clerk receives and stamps their notices of appeal before the ... deadline.” *Spells*, 213 S.W.3d at 701-702, *quoting Houston v. Lack*, 487 U.S. 266, 270-271 (1988).

Further, nothing in the post-conviction rules requires dismissal of a *pro se* motion if the showing of timeliness is not made in the *pro se* Form 40 itself. *Allen v. State*, 986 S.W.2d 491, 493 (Mo.App., W.D. 1999). Rather, the showing of timeliness is made “based on other aspects of the record, or is included in an amended Form 40 filed by counsel.” *Id.* In *Allen v. State*, the Court of Appeals, Western District found that the motion court erred in dismissing the movant’s *pro se* Rule 29.15 motion as untimely on the basis that the movant did not include the date of the Court of Appeals’ mandate. *Id.* at 495.⁷ The Court of Appeals wrote that counsel was never appointed for Mr. Allen, “and he thus never had the opportunity to file an amended motion setting forth the date we issued our mandate.” *Id.* at 494. *See also Allmon v. State*, 973 S.W.2d 163, 165 (Mo.App., E.D. 1998) (where movant’s *pro se* Form 40 was silent as to the date of his delivery to the Department of Corrections, movant was entitled to file an amended

⁷ Pursuant to Rule 29.15, where a direct appeal is taken, the *pro se* Form 40 is due ninety days after the date of the mandate of the Court of Appeals. Rule 29.15(b).

motion, after the appointment of counsel, and correct this oversight in the amended motion).

Based on the above, a post-conviction attorney's investigation into timeliness is one of the duties included in the attorney either: filing an amended motion alleging all necessary facts; or filing a statement in lieu of amended motion. It is *not* appointed counsel's duty to publicly declare that his client failed to timely file the Form 40. Under post-conviction rules, the State has thirty days after the amended motion is filed to file a response to the allegations in the amended motion. Rule 24.035(g); Rule 29.15(g). The State can assert therein that the *pro se* motion was untimely, or the State can file a motion to dismiss the case based on the alleged untimeliness of the *pro se* motion. Ultimately, though, "[i]t is *the court's duty* to enforce the mandatory time limits and the resulting complete waiver in the post-conviction rules..." *Dorris v. State, supra*, 360 S.W.3d at 268 (italics added).

Facts from the Underlying Record

On June 21, 2007, Appellant, Mr. Mark Vogl, pleaded guilty to two counts of first degree sodomy (L.F. 3, 6, 15-16). On August 30, 2007, the Circuit Court of Jasper County sentenced Mr. Vogl to two concurrent terms of fifteen years imprisonment (L.F. 3, 6, 15-16). Mr. Vogl was delivered to the Missouri Department of Corrections on September 18, 2007 (L.F. 18, 24). Pursuant to Rule 24.035(b), any *pro se* Form 40 filed by Mr. Vogl would have been due within 180 days of his delivery to the Missouri Department of Corrections, which would have been by March 16, 2008. Because March

16, 2008, was a Sunday, the last date for the motion to have been timely filed would have been March 17, 2008.⁸

The Joplin office of the Jasper County Circuit Clerk received and file stamped a *pro se* Form 40 filed by Mr. Vogl on March 18, 2008 (L.F. 9, 17, 18-23). A cover letter dated March 12, 2008, was filed with the *pro se* Form 40 (L.F. 9, 17). In the cover letter, Mr. Vogl wrote that the prison mail goes out every morning at 8 a.m., and he needed to get the Form 40 in the mail on the day he received it, March 12, 2008, in order to make the deadline; therefore, he did not include copies of the Form 40 (L.F. 17).

On April 3, 2008, the Circuit Court of Jasper County appointed counsel to represent Mr. Vogl in his Rule 24.035 case (L.F. 9). On April 16, 2008, Mr. Vogl's appointed counsel, Mr. Stephen Harris, District Defender, Office of the Post-conviction Division, Missouri State Public Defender, Columbia, Missouri, filed a "Motion Requesting Appointment of Counsel be Rescinded" (L.F. 9, 24-26). In the motion, appointed counsel requested the Court to rescind its order appointing counsel in Mr. Vogl's case and set forth as follows: "At the time of filing of his Form 40, Movant has spent 182 days in the Department of Corrections...;" "The Court is without jurisdiction to appoint counsel ... [and] has no authority to proceed;" "Rule 4-3.3(a)(3) mandates that a lawyer shall not knowingly fail to disclose to the tribunal legal authority in the

⁸ Missouri Supreme Court Rule 44.01(a) provides that if a period of time ends on a Saturday, Sunday, or legal holiday the deadline is extended to the end of the next day that is not a Saturday, Sunday, or legal holiday.

controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel;” and “Rule 24.035 and case law defining the limitations for filing under the rule are clear and it is not within counsel’s means to obviate those requirements” (L.F. 24-25).

On April 22, 2008, the Circuit Court granted appointed counsel’s Motion Requesting Appointment of Counsel be Rescinded and found that “Movant has failed to comply with Rule 24.035 and file his Criminal Procedure Form 40 within 180 days” (L.F. 9, 27). Having found that Mr. Vogl’s *pro se* Form 40 was untimely, the Circuit Court also dismissed the case with prejudice (L.F. 9).

On November 9, 2009, Mr. Vogl wrote to the Jasper County Circuit Clerk’s Office, requesting copies of documents from his post-conviction case (L.F. 9, 28). The office responded and sent Mr. Vogl a copy of all documents contained in the post-conviction file but wrote: “Unfortunately, we do not have the envelope you mailed your documents to us in as part of the file” (L.F. 9, 28).

On January 10, 2010, Mr. Vogl wrote to the Jasper County Circuit Clerk’s Office, requesting information on how mail received in the Carthage office of the Jasper County Circuit Clerk’s Office was forwarded to its Joplin office (L.F. 9, 29). On February 3, 2010, the clerk responded and wrote as follows:

Mail is received in whichever office the envelope is addressed to;

When mail is opened and determined to belong to a different office in the Courthouse, the mail is taken to the correct office (in this case the correct office was the Jasper County Circuit Clerk’s Office);

Jasper County Circuit Clerk's Office in Carthage determined your original case was handled in the Joplin location and any subsequent filings must also be filed in the Joplin location and placed your documents in a basket for our "runner" to pick up to deliver to Joplin. Our "runner" picks up every afternoon in Carthage and delivers to the Circuit Clerk's Office in Joplin the following morning. He also delivers mail received in Joplin that needs to go to Carthage.

(L.F. 9, 29).⁹

On May 26, 2010, Mr. Vogl wrote to Mr. Harris, who had been previously appointed to represent him in the post-conviction case, to inform him of what he had learned regarding the procedures employed by the Circuit Clerk's Office in processing his Form 40 (L.F. 33). On June 1, 2010, Mr. Harris responded, "Yes, I would like for you to send me a copy of the letter [from] Ms. Williams indicating the day your Form 40 was received. If that appars [sic] to make a difference, I will request the Court reopen your case" (L.F. 33).

⁹Jasper County Local Court Rule 4.3 provides that "[a]ll Circuit Court actions shall be filed with the Circuit Clerk of this County in Joplin or Carthage." "A post-conviction motion is considered filed when deposited with the circuit court clerk." *Graves v. State*, 372 S.W.3d 546, 548-549 (Mo.App., W.D. 2012), *quoting Trice v. State*, 344 S.W.3d 277, 278 (Mo.App., E.D. 2011).

On June 11, 2010, Mr. Vogl again wrote to Mr. Harris, and Mr. Harris responded in a letter dated June 22, 2010, as follows:

I received your letter dated June 11, 2010 on June 18 along with your and enclosures [sic], you make a case for your original form 40 being timely filed. It would require some conjecture to state that it was actually timely filed, however, the inference is certainly there. I see two possible ways to go at this time, you could either file a motion to open the case back up, or file another Form 40 and if the issue of timeliness comes up address that situation with the facts, as you known them, from your first attempt to file.

If you decide to file a motion to reopen your case, set out the facts and attache [sic] the evidence you have, and cite to applicable case law.

(L.F. 34).¹⁰

On June 27, 2010, Mr. Vogl wrote to the Jasper County Circuit Clerk's Office in Carthage, stating that he "need[ed] to know when your office received [his Form 40], not

¹⁰ Missouri Supreme Court Rule 4-3.3 provides that a lawyer shall not knowingly "fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer..." As such, Mr. Harris should have made some attempt to assist Mr. Vogl, have a conflict counsel assigned to assist Mr. Vogl, or to have corrected his previous declaration to the motion court, which represented to the motion court that the *pro se* Form 40 was out of time (L.F. 24-26).

when the Joplin office received it, after your office forwarded the mailing. If nothing was stamped received by your office[,] I need written reason why mailing or envelope was not stamped by your Carthage office” (L.F. 10, 30-31). Mr. Vogl cited relevant case law and wrote: “Supreme Court of Missouri has held that where a motion for post-conviction relief is filed within the time period but sent to the wrong court, it should be considered timely filed and should be transferred to the proper court rather than be dismissed” (L.F. 30-31).

The aforementioned letter was initially file stamped on July 1, 2010 as filed with the “Jasper County Circuit Clerk, Carthage, Missouri,” but that file stamp was crossed out (L.F. 30). A file stamp of July 2, 2010 indicated that the letter was file stamped the next day by the “Jasper County Circuit Clerk, Joplin, Missouri” (L.F. 30).

On August 6, 2010, the clerk responded to Mr. Vogl’s letter and wrote as follows:

In response to your letter dated June 27, 2010, and bears a postmark of June 28, 2010 and was received in our Carthage office on July 1, 2010 and in our Joplin office on July 2, 2010, you were previously notified that the envelope you mailed your Motion to Vacate, Set Aside or Correct the Judgment or Sentence is not in the file.

According to your letter dated March 12, 2008, your Motion was being mailed without copies since your housing unit was locked down and it needed to be mailed immediately. It is my presumption that your Motion went out in the next morning’s mail, being Thursday, March 13, 2008. If, as you state, mail takes three (3) days from Cameron to Carthage, that

would put it being received on Sunday, March 16, 2008 on which there is no mail delivery, subsequently being delivered to our Carthage office on Monday, March 17, 2008 and received in our Joplin office on Tuesday, March 18, 2008.

On Mondays, when we receive an abundant amount of mail, it is our normal procedure for mail to be delivered to another office to stamp one (1) envelope with the date received and then rubber band anything else to that piece of mail. ...

(L.F. 10, 32).

On August 20, 2010, Mr. Harris responded to Mr. Vogl's letters seeking help with how to reinstate his *pro se* Form 40, and Mr. Harris provided the following advice:

I have finally found the time to go over your letters and try to determine if you have an argument for asking the Court to reinstate your Rule 24.035 postconviction case. Based on the correspondence you received from Ms. Williams it appears there is potential evidence to support your argument. Whether or not the Court has jurisdiction at this late of date is questionable. I think [it] is worth filing such a motion. ... You seem to have a good handle on the facts and the ability to draft such a motion. Attach copies of any evidence you have supporting the fact your Form 40 arrived in Carthage on Monday March 17, 2008 and cite the relevant case law you included in your letters.

(L.F. 35).

On March 9, 2011, Mr. Vogl wrote to Mr. Harris and enclosed a motion that he had drafted for Mr. Harris' review (L.F. 35). On March 10, 2011, Mr. Harris informed Mr. Vogl that the motion appeared to be a "well thought out and thorough motion" and suggested that Mr. Vogl file the motion (L.F. 35).

On March 17, 2011, Mr. Vogl filed a *pro se* "Motion to Reinstate Post-Conviction Action Brought Pursant [sic] Rule 24.035 on basis of Timely Filing, and to Vacate Order Rescinded Appointment of Counsel and Dismissing 24.035 Action" (L.F. 10, 37-44). The envelope, in which Mr. Vogl mailed the motion and attachments, was retained by the Circuit Clerk's Office in Joplin (L.F. 44). The envelope indicates that: the motion and enclosures were "mailed from Crossroads Correctional Center;" the envelope was postmarked March 15, 2011; the envelope was addressed to the Joplin office of the Circuit Clerk's Office; and the envelope was file stamped as received at the Joplin office on March 17, 2011 (L.F. 44).

Thereafter, Mr. Vogl wrote to the clerk's office periodically to check on the status of his motion (L.F. 10, 45).

On November 4, 2011, the Circuit Court entered the following order: "...This Court has previously dismissed this action with prejudice for failure to file Motion within the time allowed by the rules. This Court will take no further action on this file" (L.F. 10, 46).¹¹

¹¹ Mr. Vogl attempted to perfect an appeal from that order (L.F. 10-11); he sought the appointment of counsel in the Court of Appeals, but such motion was denied and the

On May 11, 2012, Mr. Vogl filed a *pro se* “Motion to Reopen Postconviction Proceeding and Request for Hearing” and attachments (L.F. 11, 47-56). Mr. Vogl’s motion included the following allegations:

On April 3, 2008, the Circuit Court of Jasper County appointed a public defender to represent movant on his rule 24.035 *pro se* motion. This appointment was made to assist the movant in preparing any amended motion that may be necessary and to represent movant in any litigation that may result from movant’s 24.035 motion. On April 16, 2008, the public defenders office filed a motion to rescind order of appointment based on counsels assertion that movant’s 24.035 motion was filed untimely. *The motion was filed without any consultation with counsel’s client, the movant. If counsel had contacted movant, counsel would have obtained the facts that would have made counsel’s motion to rescind without merit.....*

Additionally, movant asserts he never received any notification from Public Defenders Office that his counsel intended to file a motion to rescind counsels appointment to represent movant. Had the movant been duly notified, he would have attempted to contact the court to request a hearing in said motion.

appeal was ultimately dismissed in May 2012, due to Mr. Vogl’s “Failure to Perfect Appeal.” *Vogl v. State*, SD31797.

No action was performed on the movants behalf while the appointed counsel represented him. Postconviction counsel did not comply with V.A.M.R. 24.035(e) which requires counsel to either file an amended motion for postconviction relief if his pro se motion does not assert sufficient facts, or include claims known to movant, or if counsel determines no amended motion shall be filed, to file statement explaining that all facts supporting claims and all claims known to movant are asserted in the pro se motion. The counsel has presumably abandoned movant. ... (L.F. 11, 48-50). The motion court denied the motion without an evidentiary hearing (L.F. 11, 57).

Argument

Typically, “[t]he motion court’s jurisdiction to re-open post-conviction proceedings is limited to thirty days following the court’s ruling in the proceeding.” *White v. State*, 265 S.W.3d 850, 852 (Mo.App., E.D. 2008). “The only exception to this limitation allows the motion court to reopen the proceeding to address a claim of abandonment by post-conviction counsel.” *Id.*; see *Johnson v. State*, 244 S.W.3d 226, 228 (Mo.App., E.D. 2008).

Abandonment by post-conviction counsel occurs in only three situations: (1) when post-conviction counsel takes no action with respect to filing an amended motion and the record shows the movant is deprived of a meaningful review of his claims; (2) when post-conviction counsel is aware of the need to file an amended post-conviction relief motion and fails to do so in a timely manner; or (3) when post-conviction counsel

overtly acts to prevent the movant's timely filing of a post-conviction motion. *Gehrke v. State*, 280 S.W.3d 54, 57 (Mo. banc 2009). Further, "[i]t is imperative for relief . . . that the movant in no way be responsible for the failure to comply with the requirements of . . . Rule 24.035[.]" *Id.*

A movant is presumed abandoned by counsel when the record, on its face, establishes non-compliance with the duties imposed under Rules 29.15 and 24.035. *Id.* at 374. "When this presumption arises, Movant is entitled to a hearing to determine if he was abandoned." *Id.*, quoting *Hemphill v. State*, 323 S.W.3d 442, 445 (Mo.App., E.D. 2010). "One form of abandonment occurs where postconviction counsel takes no action on the movant's behalf and, as a result, it appears on the face of the record that the movant is deprived of meaningful review of postconviction claims." *Gehlert v. State*, supra, 276 S.W.3d at 892, citing *Moore v. State*, 934 S.W.2d 289, 291 (Mo. banc 1996) and *Luleff v. State*, 807 S.W.2d 495, 497 (Mo. banc 1991).

"If postconviction counsel is found to have abandoned a movant, the proper remedy is to put the movant in the place where the movant would have been if the abandonment had not occurred." *Gehrke v. State*, 280 S.W.3d 54, 57 (Mo. banc 2009).

In *Gehlert*, court-appointed counsel, Mr. Stephen Harris, entered his appearance and requested the guilty plea and sentencing transcripts. *Id.* at 891. Over the next three years, appointed counsel failed to file an amended motion or a statement in lieu of amended motion or take any subsequent action on the movant's behalf. *Id.* To explain his inaction, appointed counsel suggested he could not file an amended motion or move forward with the case before he received the requested transcripts. *Id.* It was

subsequently determined that the reporter could not provide the transcripts due to the tape being damaged and unusable. *Id.* The motion court ultimately denied the movant's motion, finding his *pro se* motion did not include any cognizable claim under Rule 24.035. *Id.*

On appeal, the Court of Appeals, Western District reversed the denial of movant's post-conviction motion and remanded the case for a determination of whether the movant was abandoned by appointed counsel. *Id.* at 893. The Court of Appeals stated that:

while a record made at the time the plea was entered certainly would aid counsel in reviewing the case, the unavailability of a transcript does not eliminate counsel's duties under Rule 24.035 to ascertain whether the *pro se* motion is supported by sufficient facts and includes all claims known to the movant for attacking the judgment and sentence.

Id. The Court of Appeals went on to explain that the record did not establish whether the movant's appointed counsel made the requisite determinations under Rule 24.035. *Id.* The record was silent as to whether appointed counsel made any effort to contact the movant about his case, to determine if there were additional facts outside the record that might warrant relief, or to review the *pro se* motion or any other documents related to the case. *Id.* Thus, the record created the presumption that movant's appointed counsel failed to comply with the rule, and the Court of Appeals directed the motion court on remand to determine whether appointed counsel complied with the requirements outlined in Rule 24.035. *Id.*

“*Gehlert*, therefore, stands for the general proposition that a presumption of abandonment can arise when the record is silent as to whether one’s PCR counsel complied with the post-conviction rules.” *Jensen v. State*, 396 S.W.3d 369, 376 (Mo.App., W.D. 2013).

In *Moore v. State*, 934 S.W.2d 289 (Mo. banc 1996), this Court also considered *Carr v. State*, where the post-conviction attorney filed a timely statement in lieu of amended motion that set forth that counsel had reviewed the file “with the *exclusion* of the transcripts of the guilty plea hearing..., the sentencing hearing..., and movant’s prose motion...” *Id.* at 290. This Court remanded the case for a hearing to determine whether post-conviction counsel abandoned movant and wrote as follows:

Rule 24.035(e) requires counsel to ‘ascertain whether sufficient facts supporting the grounds are asserted in the motion and whether the movant has included all grounds known to him as a basis for attacking the judgment and sentence.’ In Carr’s case, the statement filed by post-conviction counsel shows *on its face* that counsel took neither of the two actions required by Rule 24.035(e). *On its face*, counsel’s statement is thus tantamount to a confession of abandonment to which *Luleff* and *Sanders* refer.

Id. at 292, citing *Luleff v. State*, 807 S.W.2d 495 (Mo. banc 1991) and *Sanders v. State*, 807 S.W.2d 493 (Mo. banc 1991).

Similarly to the cases above, in the case at bar, the record does not demonstrate that appointed counsel made any effort to contact Mr. Vogl about his case or review any

materials from the case, in order to determine if there were additional facts outside the record that might warrant relief. “Absent some performance by appointed counsel, the motion court cannot determine whether the *pro se* pleading can be made legally sufficient by amendment...” *Luleff v. State, supra*, 807 S.W.2d at 498. The record in the case at bar does not indicate that counsel complied with Rule 24.035(e) and creates a presumption that counsel failed to comply with Rule 24.035 and, thus, abandoned Mr. Vogl.

As set forth above, Rule 24.035 requires counsel to confer with the movant, determine if all facts necessary are set forth in *pro se* motion, and then file an amended motion alleging any additional facts. *Jensen v. State*, 396 S.W.3d 369, 375 (Mo.App., W.D. 2013). Counsel completely shirked his duties under Rule 24.035 and instead took an action adverse to his client’s best interests by moving the Court to rescind the appointment of counsel and wrongly representing to the Court that the Court was without jurisdiction to appoint counsel because Mr. Vogl had filed his Form 40 late.

Mr. Vogl alleged facts, which if true, establish that his post-conviction counsel’s failure to file an amended motion, as required by Missouri Supreme Court Rule 24.035, deprived him of a meaningful review of his claim that his *pro se* motion was, in fact, timely, and of his substantive claims. Because Mr. Vogl alleged facts in his motion that, if true, would establish one of the recognized forms of abandonment, he is entitled to an evidentiary hearing to determine if his post-conviction proceeding should be re-opened. The motion court’s denial of his motion to re-open and request for hearing, was clearly erroneous.

The facts of the case at bar are distinguishable from Morgan v. State and Stewart v. State.

In the State's Application for Transfer, the State cited *Morgan v. State*, 8 S.W.3d 151, 154 (Mo.App., S.D. 1999) to support its argument that counsel's action in notifying the motion court that the *pro se* Form 40 was untimely was "some action" on the movant's behalf and abandonment only occurs when counsel takes "no action." (Resp. Trans. App., pp. 4-5). However, the facts of the case at bar are distinguishable from the facts of *Morgan*. In *Morgan v. State*, post-conviction counsel filed a letter with the court recognizing the untimeliness of the movant's *pro se* motion. *Id.* at 152-154. The movant argued that his counsel abandoned him when he failed to file an amended motion and acquiesced in the dismissal of the *pro se* motion. *Id.* at 153. The Court of Appeals, Southern District found that the record rebuffed this proposition because post-conviction counsel's letter to the court recognizing the untimeliness of the *pro se* motion indicated that counsel did take some action on the movant's behalf. *Id.* at 154.

The major differences in that case from Mr. Vogl's case, though, are that in *Morgan*, the movant "[did] not argue that his Rule 24.035 motion was timely filed," but rather, he wanted to challenge the constitutionality of the time limits. *Id.* at 153. In addition, there was nothing appointed counsel could have alleged in an amended motion to permit a meaningful review of Mr. Morgan's post-conviction claims.

In the case at bar, Mr. Vogl maintained that his *pro se* Form 40 was timely filed. As such, an amended motion could have set forth sufficient allegations to support a finding of the timeliness of the *pro se* Form 40. In addition, unlike the attorney in

Morgan, who evidently correctly represented that the *pro se* motion was untimely, counsel's declaration of untimeliness in Mr. Vogl's case, was *wrong*.

Stewart v. State, 261 S.W.3d 678 (Mo.App., E.D. 2001) is also distinguishable from the case at bar. In *Stewart*, the *pro se* motion was due October 3, 2001, but was file stamped October 4, 2001. *Id.* at 678. The trial court denied the motion as untimely on July 2, 2002. *Id.* Four years later, on October 13, 2006, upon a motion by Stewart, the motion court implicitly vacated its earlier order, considered the merits of Stewart's *pro se* motion, and ultimately denied relief. *Id.* On appeal, the State challenged the motion court's jurisdiction to entertain the merits of the motion in 2006, after denying it as untimely in 2002. *Id.* at 679. Stewart, on the other hand, alleged that his post-conviction counsel abandoned him by failing to investigate the timeliness of his *pro se* motion and failing to file an amended motion. *Id.* Evidence in the record suggested that the clerk's office actually received Stewart's *pro se* motion on October 1, 2001, in which case it would have been timely. *Id.* Evidence also indicated that counsel requested leave to file an amended motion out of time, and the court essentially forbade her from filing an amendment based on their shared belief that it was untimely. *Id.* The Court of Appeals, Eastern District held that counsel's conduct did not constitute abandonment because counsel "requested leave to file out of time" and, therefore, "counsel took *some action* and had *some explanation*." *Id.*

In *Stewart*, appointed counsel sought leave to file an amended motion but was not permitted to do so. Counsel in Mr. Vogl's case apparently made no attempt to file an amended motion and did not undertake any steps toward doing so.

In addition to the above facts, undersigned counsel also has a good faith basis to assert that she will present the following additional evidence at a hearing, upon remand.

In addition to the above, undersigned counsel has a good faith basis to assert that she anticipates that, if the case were remanded for a hearing, she would adduce evidence including:

An e-mail was sent in 2007 notifying managers of public defender appellate offices (and appointed counsel, Mr. Harris, was and is the head of an appellate public defender's office and a recipient of the e-mail) that there had been more than one case where a post-conviction movant had timely filed his Form 40 but that it had been file stamped one day late and an Appellate office had moved to withdraw from the case. This e-mail included:

... I am now aware of 3 cases where Appellate has moved to dismiss PCR as untimely, then it was discovered by other counsel or the client that the motion was timely. *Obviously, this should never occur.* I'm worried that it may be happening or have happened more than we think, but the error wasn't caught.

When moving to decline representation due to untimeliness, please check and double-check these things to be sure. *I'm really concerned about the ones that appear just a few days late (which is common) ...*

Undersigned counsel anticipates that she would call Mr. Greg Mermelstein, Division Director, Missouri State Public Defender's Office, Columbia, Missouri. Mr. Mermelstein will testify that, on October 1, 2007, he sent the above directive to the

District Defenders, who head each Appellate Office within the Missouri State Public Defender's Office, and appointed counsel in Mr. Vogl's case was one of the District Defenders to whom he sent the e-mail.

Undersigned counsel will also present testimony from Mr. Vogl that, prior to the due date for his Form 40, he contacted the public defender's office for assistance in challenging his underlying criminal convictions and sentences. He was referred to the District Defender of the Appellate/Post-Conviction Division, Mr. Harris, who was the attorney later appointed to represent him after he filed the Form 40. Mr. Harris sent him a Form 40 and directed him in a cover letter to mail it to the following address:

Linda Williams
Jasper County Circuit Clerk
302 S. Main
Carthage, MO 64836.

Mr. Vogl's testimony will be that on the day that he received the Form 40, March 12, 2008, he filled it out and gave it to the prison mail. This testimony, along with the letter from Mr. Harris, will match up with Mr. Vogl's letter to Ms. Williams, dated March 12.

Counsel, who sent Mr. Vogl the Form 40 and told him to mail it to *Carthage*, was the same attorney appointed to represent him. The file stamp on the Form 40 is from *Joplin* (L.F. 18); therefore, appointed counsel would have known, just from a brief inspection of the face of the Form 40, that the file stamp occurred at a different location than where Mr. Vogl mailed the Form 40. *See also McFadden v. State*, 256 S.W.3d 103,

109 (Mo. banc 2008) (where post-conviction counsel overtly acts in a way that prevents the movant's timely filing of a post-conviction motion, a movant is entitled to relief).

Mr. Vogl will also testify regarding limitations on his access to a computer while in prison and how long it took him to discover and apply to his case: "abandonment" case law; Rule 44.01 (permitting the deadline to be extended to Monday, March 17); Local Rule 4.3 (permitting the filing of a document in either the Carthage or Joplin offices); and case law supporting the proposition that the receipt of his Form 40 by the Carthage office should have been the filing date for his Form 40.

Request for Relief

Mr. Vogl respectfully requests that this Court reverse the motion court's denial of his motion to re-open the post-conviction case and remand the case back to the Circuit Court for a hearing on the issues of whether Mr. Vogl's *pro se* Rule 24.035 motion was timely filed and whether he was abandoned by post-conviction counsel.

In addition, Mr. Vogl respectfully requests that this Court consider reversing the denial of Mr. Vogl's motion to re-open the postconviction case and remanding to permit undersigned counsel to file an amended motion or a statement in lieu of amended motion. Mr. Vogl asks this Court to consider such request, because the Circuit Court, on January 31, 2013, entered the following Order:

... This is an unusual case in that it appears Movant's original motion was mailed to the Carthage office of the Circuit Clerk. The fact that Jasper County is one of the unusual jurisdictions where pleadings can be filed in either Joplin or Carthage complicates the case. The Carthage office

determined the pleadings should have been filed in Joplin and the pleadings were transferred from Carthage to Joplin where they were filed one day past the last date for filing the motion under Rule 24.035. Because the motion was not shown as filed until one day late this court rescinded its order appointing counsel and dismissed the case.

This court has determined by an examination of the file that no evidentiary hearing is necessary to determine if Movant was “abandoned” by his appointed counsel. The fact that this court rescinded its order appointing counsel on a case where it appears the motion may have been timely filed establishes the fact that Movant is entitled to have this case reopened.

Case is ordered reopened. Court appoints Public Defender to represent Movant. ...

(Supp. L.F. 1-2). Because the motion court has already factually found that Mr. Vogl’s *pro se* Form 40 may have very well been timely filed and that Mr. Vogl is entitled to have counsel file an amended motion or a statement in lieu of amended motion, undersigned counsel (who has already been assigned that case and entered her appearance) respectfully requests that this Court consider remanding the case to permit undersigned counsel to file an amended motion (without the additional requirement of a hearing on the issues of timeliness or abandonment).

CONCLUSION

Mr. Vogl respectfully requests that this Court reverse the motion court's denial of his motion to re-open the post-conviction case and remand the case back to the Circuit Court for a hearing on the issues of whether Mr. Vogl's *pro se* Rule 24.035 motion was timely filed and whether he was abandoned by post-conviction counsel. Because the motion court has already factually found that Mr. Vogl's *pro se* Form 40 may have very well been timely filed and that Mr. Vogl is entitled to have counsel file an amended motion or a statement in lieu of amended motion, undersigned counsel respectfully requests that this Court also consider remanding the case to permit undersigned counsel to file an amended motion (without the additional requirement of a hearing on the issues of timeliness or abandonment).

Respectfully submitted,

/s/Jeannie Willibey
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CERTIFICATE OF SERVICE

A true and correct copy of the Brief and Appendix was sent through the eFiling system, on this 25th day of June, 2013, to: Mr. Andrew C. Hooper, Office of the Attorney General, at andrew.hooper@ago.mo.gov.

/s/ Jeannie Willibey
Jeannie Willibey

CERTIFICATE OF COMPLIANCE

I, Jeannie Willibey, hereby certify as follows:

The attached brief complies with the limitations contained in Rule 84.06. The brief was completed using Microsoft Word, Office 2007, in Times New Roman size 13 point font. Excluding the cover page, the signature block, this certification, and the certificate of service, the brief contains 10,700 words, which does not exceed the 31,000 words allowed for an appellant's brief.

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